

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene
Gomez-Bethke, Commissioner
Department of Human Rights,

Complainant,

VS.

Construction and General Laborers,
Union No. 563, AFL-CIO,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, commencing at 9:00 a.m. on Wednesday, November 9, 1983, at the Office of Administrative Hearings, Courtroom 12, 300 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, pursuant to an Amended Notice of and Order for Hearing dated September 27, 1983.

Elizabeth V. Cutter, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. Samuel I. Sigal, Sigal and Miller, Attorneys at Law, 1208 Plymouth Building, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent. The record closed on Monday, December 5, 1983, at the conclusion of the authorized briefing period.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2 (1982), as amended by Minn. Laws 1983, Ch. 301, 201, this Order is the final decision in this case and under Minn. Stat. 363.072 (1982), as amended by Minn. Laws 1983, ch. 247, Of 144-145, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69 (1982), as amended by Minn. Laws 1983, ch 247, 9-14.

STATEMENT OF ISSUES

The issues in this case are whether the Respondent labor union's employee discriminated against a union member on the basis of race by using a racial epithet when addressing that member, thereby denying him -full and equal membership rights and, if so, the damages or other relief the union member is entitled to receive.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Respondent is an affiliated local union of the Laborers' International Union of North America. On May 3, 1982, it had approximately 3,600 members, 400 of whom (11%) were black persons.

2. The Respondent represents construction laborers in approximately 22 Minnesota counties and is the largest local construction laborers' union in

the Northwest. It is governed by an elected, seven-member Executive Board. the Executive Board consists of a President, Vice-President, Secretary/treasurer, Recording Secretary, Business Manager, and two members holding no office. Only the Secretary/treasurer and the Business manager devote their full-time to union business. All other Executive Board members maintain regular employment as construction laborers. they are engaged in union activities only on a part-time basis.

3. At all times relevant to this case, the Respondent's Business Manager was Howard Johnson. He is responsible for the supervision of five Business agents (field representatives) employed by the union on a full-time basis. The Business Agents are responsible for visiting construction sites in the Respondent's geographic area to make sure that laborers are assigned to all work within the union's jurisdiction, to protect members' rights to overtime and fringe benefits, to check union membership cards, to solicit business from contractors and to collect executed contracts. The Business Manager hires Business agents subject to approval by the Executive Board and has authority to discipline or discharge them.

4. The Charging Party, Richard Stewart, a black man, is a member of the Respondent's union. He has been a member since July, 1965.

5. On May 3, 1982, Stewart attended a regular monthly union meeting at the Respondent's Minneapolis union hall. forty-three union members, including the entire Executive Board and all five business representatives, were present at that meeting. Business representatives are required to be present at such meetings as a part of their regular job duties. Following customary practice, the Business Manager, the Secretary/Treasurer, the Recording Secretary and the President were seated at the front of the meeting room behind two six-foot tables facing the membership. Other Executive Board members were seated toward the back of the meeting room. The meeting was chaired by the President.

6. In early 1982, an unusually high number of union members were without work. The extent of this unemployment was a frequent topic of angry discussion at union meetings. the May 3, 1982, meeting was no exception.

7. During the course of the meeting, a black union member, Art Williams, was recognized to speak. Williams was unhappy with the matter in which job referrals were made to minorities and was particularly upset with the job performance of Wallace Small, one of the Respondent's business representatives. While Williams was speaking, Small and Stewart became engaged in a short argument of their own. At one point in that argument, when both men were standing and facing one another, Small said in a loud voice: "Nigger, we're going to put you in a hole." Small's remark was directed at Stewart and was overheard by two other union members, Frank Patchen and Roger Bushey.

2. Small's comment resulted in no action by the President and the meeting continued for another 30 minutes before it was adjourned. Although Stewart was upset by Small's remark, he did not complain to the Business Manager or other Executive Board members about it at that time.

9. Stewart filed a charge of discrimination against the union with the Minnesota Department of Human Rights on July 9, 1982. Then, at the regular monthly union meeting held on July 12, 1982, he mentioned his complaint about Small for the first time. The members of the Executive Board told Stewart to

request a special Board meeting to consider his complaint. Stewart submitted

such a request when the July 12 union meeting was adjourned.

10. The Executive Board met with Stewart on August 3, 1982, and listened

to his complaint, which Patchen and Bushey verified.

11. On August 5, 1982, the President, Maurice Johnson, wrote to Stewart

concerning his complaint. In that letter, Johnson stated in part as follows:

It is our policy to hear all sides of any dispute between members of the union. Unfortunately, Wally Small has been seriously ill for the past few months. He is hospitalized and unable, because of his illness, either to attend any meeting or to communicate. Thus he cannot state his version of what occurred or what was said at the time in question.

I cannot judge the facts until such time as, hopefully, Mr. Small recovers from his illness and is able to state his version of the facts.

Nevertheless, the members of the Local 563 Executive Board want you to know that the Union strongly disapproves of and condemns the use of any insulting language, threats, racist remarks, or unseemly conduct, no matter who is guilty of such conduct.

If the language attributed by you to Mr. Small was, in fact, used, an apology is due to you.

12. Russell Small suffered a cardiac arrest on May 10, 1982, and due to the loss of oxygen to his brain, went into a coma. Small remained in a comatose condition until March 7, 1983, when he died.

13. The Complainant served its Complaint and its notice of and Order for Hearing upon Respondent's counsel on September 6, 1983. It was duly answered by the Respondent on October 14, 1983. Subsequently, an amended Complaint was issued by the Complainant and served on the Respondent.

Based on the foregoing Findings of fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAN

1. that the Hearing Examiner has jurisdiction herein and authority to issue his Order in this matter under Minn. Stat. 363.071, subds. 1-3 (1982).

2. that the Respondent received proper notice of the hearing in this matter and that the Complainant has complied with all other relevant, substantive and procedural requirements of law and rule.

3. That the Respondent is a labor organization as defined in Minn. Stat.

363.01, subd. 5 (1982).

4. That the Complainant has failed to establish a prima facie showing that the Respondent discriminated against the Charging Party by denying him full and equal membership rights on the basis of Ids race for purposes of Minn. Stat. 363.03, subd. 1(1)(a) (1982).

5. That an isolated racial slur does not rise to the level of racial discrimination under Minn. Stat. 363.03, subd. 1(1)(1982).

6. That a union member is not required to exhaust "grievance" procedures available under union or international constitutions before filing a charge of discrimination under the Minnesota Human Rights Act.

7. That a union Executive Board does not ratify or become responsible for a union employee's racial epithet during a union meeting by ignoring the epithet used, where a qualified written apology is subsequently issued.

B. That the Respondent is not entitled to an award of attorney's fees or disbursements.

Based on the foregoing Conclusions of Law:

ORDER

IT IS HEREBY ORDERED:

That the Complainant's Complaint in this matter be and the same is hereby dismissed.

Dated this 5th day of December, 1983.

JON L. LUNDE
Hearing Examiner

MEMORANDUM

The Complaint charges that the Respondent discriminated against a union member on the basis of his race in the terms of his membership, contrary to the provisions of Minn. Stat. 363.03, subd. I (1) (a). The statute prohibits racial discrimination against union members, providing, in part, as follows:

Subd. 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race

(a) to) deny full and equal membership rights to a person seeking membership or to a member

The Minnesota Supreme Court has recognized that decisions of the federal courts under Title VII of the Civil Rights Act of 1964 are applicable in determining whether violations of similar provisions of the Minnesota Human Rights Act have occurred. *Danz v. Jones*, 263 N.W.2d 395 (Minn. 1978).

Although Title VII is directed mainly at employer discrimination, it also covers discrimination by labor unions. Under 42 U.S.C. 2000e-2(c)(1), it is an unlawful employment practice for a labor organization to exclude or expel from its membership or otherwise to discriminate against any individual be-

cause of his race. The parties cited no Federal or State decisions involving the use of racial slurs by union employees against union members. However,

the use of racial slurs has been frequently considered in the employment context. In that context, the courts have recognized that the terms and conditions of employment include the working environment and that an employee's working environment can become so "heavily polluted" or dangerously charged" with discrimination as to constitute a violation of Title VII. Rogers v.

Equal Employment Opportunity Commission 454 Fed. 2d 234, 4 F.E.P. 92 (5th Cir. 1971), cert. den., 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343, 4 F.E.P. 771 (1972); Bundy v. Jackson, 641 F.2d 934, 24 F.E.P. 1155 (D.C.Cir.1981). The Minnesota Supreme Court has reached a similar conclusion. Continental Can Co., Inc. v. State, 297 N.W.2d 241 (Minn.1980). Similar principles should be applied to labor unions under Minn. Stat. 363.03, subd. 1(1), so that Where the union atmosphere becomes so heavily polluted or dangerously charged with discrimination, a violation of the members civil rights will be found. It is clear that the rights of union members may be affected by a discriminatory atmosphere. Such an atmosphere may deter membership by protected class members or deter their exercise of basic union rights. In either case, employment opportunities and employment-related rights would be unfairly affected. Therefore, it is concluded that a union denies full and equal membership rights to members when the union atmosphere becomes heavily polluted or dangerously charged with racial harassment and the union fails to take reasonable and positive steps to eliminate it.

In determining whether the racial epithet used by Small constitutes a violation of the Minnesota Act, cases arising in the employment context should be followed. In employment cases the rule adopted in the Eighth Circuit, and generally followed by other courts, is that all racial slurs do not amount to a title VII violation. In Johnson v. Bunny Bread Co., 646 F.2d 1250, 25 F.E.P. 1326, 1332 (8th Cir. 1981), the court stated with respect to racial slurs: "In this area, we deal with degrees . " The court went on to hold that since no steady barrage of approbrious racial comments were shown, no Title VII violation existed. The court held that the racial attitudes which were demonstrated were largely the result of individual attitudes and, while not to be condoned, did not violate Title VII. The court generally cited with approval the decision in EEOC v. Murphy Motor Freight Lines, 488 F.Supp. 381, 22 F.E.P. 892 (D. Minn. 1980). In that case the court held that there are two

primary conditions for a finding of racial harrassment. First, there must be more than a few isolated instances of racial slurs, and that where racial slurs and racial jokes are casual, accidental, sporadic or isolated, no violation of title VII occurs. Second, the court held that the employer must take positive action or reasonable steps to prevent such harrassment. Therefore, if there are more than a few isolated instances of racial slurs and the employer fails to take reasonable or positive steps to prevent those occurrences, a Title VII violation will be found.

The Minnesota Supreme Court has considered the use of racial epithets under the State Act. In *City of Minneapolis v. Richardson*, 307 Minn. 80, 239 N.W.2d 197, 203 (1976), it stated:

When a racial epithet is used to refer to a person of that race, an adverse distinction is implied between that person and other persons not of his race. The use of the term 'nigger' has no place in the civil treatment of a citizen by a public official. We hold that the use of this term by police officers, coupled with all of the other uncontradicted acts described herein, constitute discrimination because of his race.

The other uncontradicted acts involved in that case consisted of dragging the 17-year old child face down along 24 feet of sidewalk and threaten him twice with police logs after he was taken into custody.

In *Lamb v. Village of Bagley*, 310 N.W.2d 508 (Minn. 1981), the court found employment discrimination where racial epithets and other discriminatory treatment were established. In *City of Minneapolis v. State, by Wilson*, 310 N.W.2d 485 (Minn. 1971), the court found the use of the words "nigger lover" by the police violated the Human Rights Act. In that case, the police engaged in other discriminatory conduct during the course of the same incident, although it involved other individuals.

Based on these cases, it is concluded that Small's one, isolated remark to Stewart does not rise to the level necessary to establish a prima facie showing of racial discrimination as to the charging party's membership rights. The remark was an isolated occurrence, and there is no evidence that the charging party or other minority union members were subjected to a steady barrage of racial epithets, or that the atmosphere at union meetings or at the union hiring hall was heavily polluted or dangerously charged with racial harassment or racial animus. In fact, except for Stewart's complaint, there had never been a complaint against the union in its treatment of minority union members. Decisions of the Minnesota Supreme Court do not suggest a different conclusion. Two of those decisions involved state action in the provision of sensitive public services. The behavior of public employees, especially the police, involve unique demands which are different from the employment-related considerations arising in employment and union membership matters. Moreover, in all those cases racial slurs were accompanied by other discriminatory conduct not present here.

Small's remark was purely the result of his personal attitudes or an accident and was not coupled with other acts of discriminatory treatment, such as those that existed in *City of Minneapolis v. Richardson*, supra, or *Lamb v. Village of Bagley*, supra. The Respondent is not responsible at its peril for

the individual attitudes or the isolated remarks of its employees.
Clark v.

South Central Bell Tel. Co., 18 F.E.P. 630, 639 (W.D.La.1976).

The Complainant argues that members of the Executive Board must have heard

Small's remark and that the president's failure to immediately sanction him

for it constituted ratification and makes the Respondent liable under the

Human Rights Act. The Hearing Examiner is persuaded that Small's comment was

made in a loud enough voice to be heard by most of the members of the

Executive Board. The meeting room was not so large that a loud racial epithet

made by a union employee, while standing, would have gone unheard by most

persons present, including the President.

However, even if the remark was overheard, the President's failure to

reprimand Small at that time does not amount to a ratification and does not

change the isolated nature of the remark made, or render the environment

sufficiently polluted with harassment or discriminatory animus so as to constitute a violation of the law.

During the time period in which the meeting

took place, unemployment among union members was 'high and union meetings were

frequently heated and tempers ran thin. Crude language was not unusual. The

isolated use of a racial slur in that environment does not rise to the level

of a Title VII violation or a violation of the Human Rights Act.

Moreover, the record does not support ratification by the union president's failure to censure Small at the 'hearing. Stewart did not complain at the time the remark was made or at the conclusion of the meeting. He waited almost a month before bringing the matter up again, and when he did, the Executive Board scheduled a special meeting to consider his complaint. After hearing his complaint and his two witnesses' testimony, the President wrote to Stewart acknowledging his right to an apology if the statement was made. The Board, for policy reasons, was unwilling to find that Small's remark was made or take any other affirmative action until Small had an opportunity to respond to it. However, Small was in a coma from early May, 1982, until the time of death in March, 1983, and never had an opportunity to respond to Stewart's charge or explain his actions. The positive action available to the Board in these circumstances was minimal, and the action it took was reasonable under the circumstances. The president's failure to take immediate action against Stewart at the meeting was not shown to have been necessary, where the argument between Stewart and Small was short-lived and no disruption of the meeting occurred, and where the meeting continued without incident for at least another 30 minutes before being adjourned. That decision does not establish ratification of the attitudes reflected, in the absence of some other invidious racial conduct by the Executive Board.

The Complainant argues that since the Executive Board knew Small was a racist when he was hired that it is responsible for the racial slur made at the meeting. However, its evidence on that issue was not persuasive. Patchen's believability on Small's racial attitudes was seriously challenged by the fact that he disliked Small, and no other corroborating evidence supports his testimony was presented. Even if the hearing Examiner were persuaded that Patchen's testimony was credible, it would not change the conclusion in this case. If Small had distasteful racial biases, his personal biases would not constitute a Title VII violation in the absence of some dis-

crimnatory conduct affecting the conditions of Stewart's membership. How-
ever, except for the one remark made, no such conduct was shown. The union simply is not responsible for that isolated remark, even if it knew that he 'had a reputation for racial hostility where he had worked for years as a union employee without engaging in any other substantiated discriminatory treatment of minority union members. Consequently, it is concluded that the Complainant 'has failed to establish a. prima facie showing of discrimination against the Charging Party in Stewart's membership rights.
lie Fespondent argued that since Stewart failed to exhaust 'his remedies under the provisions of the local union's and tne international union's constitutions, that 'he could seek no relief under the Minnesota Human Rights Act. That argument is wholly unpersuasive. The Act does not require an aggrieved person to exhaust other- remedies he may have for discriminatory treatment, and there is no evidence that the union could afford him the kind of relief the law provides to him. The United States Supreme Court has made it clear that the provisions of Title VII are supplementary to other existing remedies, and that tne exhaustion of remedies under collective bargaining agreements is not necessary before filing formal charges under the Act. Alexander v. Gardener-Denver Company, 415 U.S.36, 94 S.Ct. 1011, 39 L.Ed.2(d

147 (1974). The same principles are applicable here, and the Respondent's exhaustion arguments must be rejected.

The Respondent has requested an award of its attorney's fees and expenses in this matter. That request must be denied. In proceedings under the Federal Administrative Procedure Act, the "American rule" has been adopted by the United States Supreme Court. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Under that rule a prevailing party is not generally entitled to an award of attorney's fees in the absence of statutory authorization or argument. The American rule is followed in Minnesota. *Dworsky v. Vermes Credit Jewelry, Inc.*, 244 Minn. 62, 69 N.W.2d 118, 124 (1955); *Grodzicki v. Quast*, 276 Minn. 34, 149 N.W.2d 8, 12 (1967). A corollary rule followed in the United States and repeatedly followed in Minnesota is that in the absence of a specific statute the State is immune from and not liable for attorney's fees or other costs in a civil action to which it is a party. *Bergseth v. Zinsmaster Baking Co.*, 252 Minn. 63, 89 N.W.2d 172, 179 (1958), and *Department of Employment Security v. Minnesota Drug Products, Inc.*, 258 Minn. 133, 104 N.W.2d 640, 645 (1960). Under Federal law the Supreme Court has held that prevailing party defendants are entitled to attorney's fees only if the plaintiff's action is frivolous, unreasonable or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S., 412, 98 S.Ct. 694, 16 F.E.P. 502 (1978). In this case the awarding of attorney's fees to the Respondent and against the State is not authorized. Since the awarding of attorney's fees or other costs, expenses or disbursements is not authorized by statute, and since the Complaint in this case was not clearly, frivolous, unreasonable or without foundation, the Respondent's request must be denied.

J.L.L.